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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908. No. 191.

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK J. ORMSBY, DECEASED, *Petitioners*,

v.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

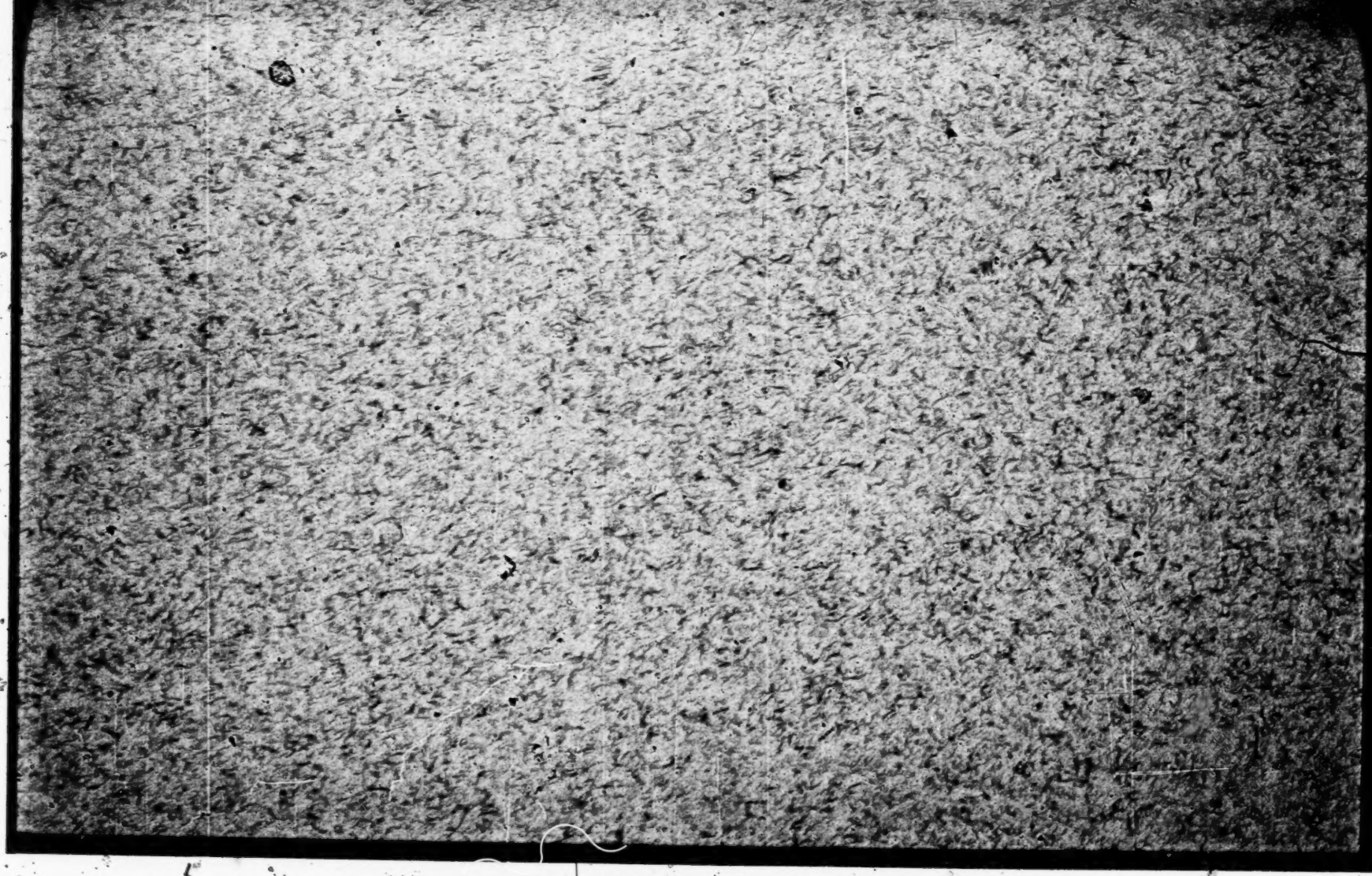
REPLY BRIEF FOR PETITIONERS.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

LAURENCE H. ELDREDGE,
C. BREWSTER RHOADS,
ROBERT T. McCRACKEN,
Attorneys for Petitioners,
1421 CHESTNUT STREET,
PHILADELPHIA, PA.

MONTGOMERY & McCRACKEN,
Of Counsel.

KING, LAIRD & SCOTT, PRS., PHILADELPHIA.



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REPLY BRIEF FOR PETITIONERS.

I. The Petitioners Properly Raised the Substantive Defense that Respondent's Cause of Action Abated with the Tortfeasor's Death.

Counsel for the respondent devote sixteen pages of their brief to arguing that the defense here presented is in the nature of a dilatory plea to the jurisdiction of the district court and that such defense has been waived by petitioners' failure to raise it in the manner prescribed by *Section 20* of the *Pennsylvania Practice Act of 1915, P. L. 483; 12 PS §471;* or by the *Pennsylvania Act of March 5, 1925, P. L. 23; 12 PS §672-675.*

The same argument was made unsuccessfully in both the district court and in the circuit court of appeals. We submit that that question is not before this Court and that such argument is, in any event, untenable. The question of waiver is only important where a valid cause of action exists and a defendant seeks to raise some technical or formal objection to the manner in which an action has been instituted. Where, however, there is no cause of action, it is difficult to see how a defendant's failure to make a particular objection in a particular way, can create a right of action which did not theretofore exist.

We submit that the fallacy of this part of the argument for the respondent is in the premise that the

defense set up by the petitioners is in the nature of a dilatory plea, a plea in abatement, and that such a plea cannot be raised in an affidavit of defense, but must be raised by a statutory demurrer, under *Section 20* of the *Pennsylvania Practice Act of 1915 (P. L. 483)*. However, Section 20 of the Practice Act merely provides that the defendant "**may** raise any question of law, without answering the averments of fact in the statement of claim * * *." It does not provide that the defendant **must** raise a question of law in this manner. Furthermore, *Section 3* of the *Practice Act* expressly provides: "Pleas in abatement * * * and all other pleas are abolished. Defenses heretofore raised by these pleas shall be made in the affidavit of defense." The defense in the present case was duly and properly raised in the affidavit of defense.

The allegation that the respondent's cause of action, if any she had, abated with the tortfeasor's death, can under no theory of common law pleading be deemed a plea in abatement. It is definitely a plea in bar which sets up a complete defense to this action and to any other action to recover for the injuries here sued for, which the appellant may institute in any court at any time. In

Stephen on Pleading (1867), 9th Am. Ed.,

the writer says, at page 46:

> "*Pleas* are divided into pleas DILATORY and PEREMPTORY; and this is the most general division to which they are subject.

"Subordinate to this is another division. Pleas are either *to the jurisdiction of the Court—in suspension of the action—in abatement of the writ of declaration—or in bar of the action;* the three first of which belong to the DILATORY class, the last is of the PEREMPTORY kind."

He said further, at page 49:

"The effect of all pleas in abatement, if successful, is, that the particular action is defeated. But, on the other hand, the right of suit itself is not gone; and the plaintiff, on resorting to a better form of writ or declaration, may maintain a new action, if the objection were founded on the frame or tenor of those instruments; or if the objection were to the ability of the party * * * a new action may be brought when that disability is removed."

With reference to pleas in bar, the same author says at page 51:

"A *plea in bar of the action* may be defined as one which shows some ground for barring or defeating the action. A plea in bar is, therefore, distinguished from all pleas of the dilatory class, **as impugning the right of action altogether,** instead of merely tending to divert the proceedings to another jurisdiction, or suspend them, or abate the particular writ or declaration. It is, in short, a substantial and conclusive answer to the action."

In

McKelvey on Common Law Pleading (1917), (2d Ed.),

the author says at page 95:

"§130. Dilatory pleas may be divided into three general classes, in respect to the effect which they have upon the disposition of the action: (1) Pleas to the jurisdiction of the court. (2) Pleas in suspension of the action. (3) Pleas in abatement.

"§131. (1) The plea to the jurisdiction of the court was in substance a statement that the plaintiff had commenced his action in the wrong court, either because the court had no jurisdiction of the subject-matter of the action or of the parties thereto, and that on that account the defendant ought not to be compelled to plead. A judgment for the defendant upon a plea to the jurisdiction was a virtual ending of the suit, as far as the particular court in which it was brought was concerned.

"§132. (2) The plea in suspension was a plea which showed matter, such as the excommunication or outlawry of the plaintiff, by reason of which he was not entitled to prosecute the action at the time. A judgment for the defendant upon such a plea amounted practically to an adjournment of the case indefinitely. In the language of the time, it was that he 'go quit without day,' but the action was not abated, and upon an ending of the disability by pardon, the plaintiff could proceed with the action.

"§133. (3) The term *plea in abatement* has

been quite generally used as synonymous with the term *dilatory plea.* This use of the term is inaccurate, as there is a very substantial difference between the *plea in abatement* and the other dilatory pleas. While the *plea to the jurisdiction,* if successful, disposes of the case entirely as far as the particular court is concerned, and the *plea in suspension* merely suspends the progress of the suit temporarily, the *plea in abatement* occupies a middle ground between the two. Its effect, if successful, is to dispose of the particular suit, but the plaintiff may commence anew upon the same cause of action in the same court, only being careful to avoid the mistake which caused the abating of his former suit."

He says further, at page 98:

"Judgment upon the dilatory plea was not final, as in the case of judgment upon a demurrer; it did not determine the case upon the merits. Mention has already been made of the fact that the plaintiff could, upon judgment against him upon a dilatory plea, either begin the action again in another court, proceed with it in the same court at a later date, or begin anew in the same court."

Mr. McKelvey then goes on to point out that there are two classes of pleas in bar, (1) pleas by way of confession and avoidance; and (2) pleas by way of traverse. He then says at page 105:

"§148. Pleas by way of confession and avoidance are of two kinds:

"(1) Pleas in discharge.

"(2) Pleas in excuse.

"The distinction between the two kinds is expressed in their names.

"Section 1.—Pleas in Discharge.

"§149. A plea in discharge is one which not only admits the facts stated in the declaration to be true, but also that the plaintiff at one time had a good cause of action against the defendant upon such facts, **and then alleges new matter which shows that the cause of action no longer exists.** This new matter is called matter in discharge."

In view of this analysis of different kinds of pleas, we submit that the defense in the case at bar can in no wise be deemed a dilatory plea. The determination of the case upon the defense here raised is a final determination upon the merits. The respondent cannot commence another suit in the court from which this appeal was taken, or in any other court. We submit that the defense here raised is, under common law pleading, that particular plea in bar which is known as a plea in discharge, inasmuch as it "alleges new matter which shows that the cause of action no longer exists."

It is equally clear that the *Act of 1925, P. L. 23* is wholly inapplicable to the case at bar. The title of that Act sets forth that it is

"An Act.

In relation to the procedure in certain classes of cases in which there is raised *a question as to the jurisdiction* of a court of first instance over the defendant or the cause of action for which

suit is brought; and authorizing appeals from the preliminary decision of such questions."

The purpose and scope of this Act have been repeatedly determined by the Supreme Court of Pennsylvania, and that court has uniformly held that the statute only relates to purely jurisdictional questions. In *Wilson* v. *Garland* (1926), 287 Pa. 291, 293, after citing the *Act of March 5, 1925, P. L. 23,* the court said *per curiam:*

> "That act provides for a preliminary determination of **questions of jurisdiction** in courts of first instance, for an appeal from the judgment entered on such questions, if the appeal is taken within fifteen days, and for advancement of such cases on the lists of the appellate courts. Appearance of defendant to object **to the jurisdiction** under this act is de bene esse only. **As may readily be seen, the purpose of the statute is to afford a speedy means of securing a final determination of jurisdictional matters in limine, before inquiry into the merits of the case.**"

In *Lackawanna County* v. *James* (1929), 296 Pa. 225, 227, Mr. Justice SIMPSON said:

> "It will be observed that the statute applies only where there is a 'question of jurisdiction over the defendant, or of the cause of action for which suit is brought.' Here, defendants have been duly served, hence there is jurisdiction over them; and the causes of action are assumpsit on surety bonds, over which causes the court below had jurisdiction. The purpose of the statute is to enable a defendant to have de-

termined, preliminarily, whether he is required to answer to the action, instead of having to wait until after he has incurred the delay and expense of a trial and appeal, only to find out, at the end of the litigation, that the case should not have been heard on the merits at all. **It was not intended to furnish a short cut to a determination of the issues of law or fact, raised by the pleadings, however certain their ultimate determination may apear to be.**"

In *Lewis* v. *Beatty* (1932), 306 Pa. 242, 244, the court said:

"The appeal is without merit. The court has jurisdiction over the defendant as he was personally served and no question is raised as to the regularity thereof. It is equally clear that the court of common pleas where the suit was brought has jurisdiction over the cause of action, to wit, slander. **Having jurisdiction over both the defendant and the cause of action the petition could not be granted.** * * * The above cited Act of 1925 confines the right of such preliminary appeal to the question of jurisdiction and it cannot be made a substitute for a general appeal. As to the other questions sought to be raised here the appeal is premature. Neither the sufficiency of the pleadings **nor any other questions suggested as an answer to plaintiff's claim, aside from jurisdiction,** can be considered on appeal under the Act of 1925. We have often so held."

Other decisions to the same effect include: *Clark* v. *Elkin* (1925), 283 Pa. 339; *Conerty* v. *Butler Co. Oil Ref. Co.* (1930), 301 Pa. 201, 202;

Fidelity-Philadelphia Tr. Co. v. *Berkin* (1930), 299 Pa. 196, 197; *Gilbert* v. *Lebanon Valley St. Ry. Co.* (1931), 303 Pa. 213, 217; *Gray* v. *Camac* (1931), 304 Pa. 74, 76; *Polakoff* v. *Marchand* (1926), 287 Pa. 28, 30; *Rutherford Water Co.* v. *Harrisburg* (1929), 297 Pa. 33, 36; *Skelton* v. *Lower Merion Twp.* (1930), 298 Pa. 471, 473; *Speckter v. North British & Mer. Ins. Co.* (1928), 293 Pa. 232, 236; *Staryen* v. *Midouhas* (1930), 299 Pa. 352, 353; *Wettengel* v. *Robinson* (1927), 288 Pa. 362, 367.

We submit that the foregoing decisions establish that the *Act of 1925* is completely inapplicable to the present case. The district court undoubtedly had jurisdiction over the petitioners personally. The writ of summons was duly served on April 25, 1927, upon each of the petitioners. There is no question that the service was irregular or improper in any way. So also, it cannot be disputed that the United States District Court has jurisdiction to hear and determine an action of trespass to recover damages for injuries negligently inflicted. The petitioners have not sought to raise any question of jurisdiction. While fully recognizing the jurisdiction of the court below over the subject matter of this suit and over the persons of the petitioners, they take the position that the respondent has no cause of action against them. This problem has nothing to do with the question of jurisdiction.

In the present case, no cause of action existed when the respondent instituted the present suit.

Whatever cause of action once existed had come to a complete end with the death of the tortfeasor. The affidavit of defense sets forth the non-existence of any cause of action as a complete bar to the appellants' claim. This plea amounts to a plea in bar and under the specific provision of Section 3 of the *Pennsylvania Practice Act of 1915, P. L. 483,* was properly raised in the affidavit of defense.

II. The Law of New York.

On page 23 of respondent's brief, counsel quoted the statement on page 22 of our principal brief that "It is conceded in the case at bar that under the law of New York the respondent had no right of action after Ormsby's death." Counsel for the respondent then go on to say:

"We do not make any such concession."

We are at a loss to understand what counsel can mean by this statement, but if it is meant to imply that an action does not abate with the death of a party under the law of New York, such implication is grossly inaccurate. The whole issue in this case arose only because the New York law is as we stated it. Up to the present time all the courts which have had this case before them have assumed, without dissent from counsel for the respondent, that the New York law is as we stated it in our principal brief.

In the district court Judge Dickinson said:

"By the laws of that State (New York) the common law maxim is followed that the right

of recovery for personal torts dies with the person of the tort-feasor * * *." (R. 10.)

In the circuit court of Appeals Judge Davis said:

"In New York, the death of Ormsby abated the action, * * *." (R. 19.)

On page 2 of the petition for writ of certiorari it is stated as a fact that under the law of New York respondent's cause of action abated with Ormsby's death. This averment is nowhere controverted in the respondent's answer.

As far as the New York authorities are concerned they are letter clear in holding that the respondent had no right of action after Ormsby's death: *Section 120, Decedent Estate Law of New York; McDonnell* v. *Gerken* (1922), 234 N. Y. 623; *Gorlitzer* v. *Wolffberg* (1913), 208 N. Y. 475; *Hegerich* v. *Keddie* (1885), 99 N. Y. 258—leading case; *Bernstein* v. *Queens County Jockey Club, et al.* (1927), 222 App. Div. 191; *Clough* v. *Gardiner* (1920), 111 N. Y. Misc. 244, Aff. (1920), 194 App. Div. 923.

Furthermore, as is shown by many of the cases (including *Sumner* v. *Brown* (1933), 312 Pa. 124), cited in our principal brief, the burden of pleading and proving that a cause of action does survive is on the respondent. Neither the Statement of Claim (R. 2-4) nor the respondent's offer of proof (R. 14-16) contain one word to show that the New York law is other than as we have stated it. If such were indeed the fact we would not be here now.

III. Conclusion.

We therefore submit that the decision of the Circuit Court of Appeals should be reversed and the judgment of non-suit, which was entered by the District Court, reinstated.

Respectfully submitted,

LAURENCE H. ELDREDGE,
C. BREWSTER RHOADS,
ROBERT T. MCCRACKEN,
Attorneys for Petitioners.

MONTGOMERY & MCCRACKEN,
Of Counsel.